IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.857 OF 2005

Perstorp Aegis Chemicals
Private Limited .. Petitioner.

V/s.

Union of India & Others .. Respondents.

Mr.V.S. Nankani i/b. M. Baya for the petitioner.

Mr.B.A. Desai, Additional Solicitor General with Mr.V.H. Kantharia for respondent Nos.1 and 2.

Mr.Janak Dwarkadas, senior advocate with Mr.Darius Shroff with Mr.Darius Khambata i/b. Bachubhai Munim for respondent No.3

CORAM : V.C. DAGA &
J.P. DEVADHAR, JJ.

DATED : 6TH MAY, 2005.

P.C. :

1. Heard learned counsel for the parties.

2. In this petition, the petitioners have challenged the notification dated February 4, 2005 wherein the Designated Authority has initiated anti-dumping investigation under the Anti-Dumping Rules in respect of pentaerythritol originating in or imported from China PR & Sweden.

3. According to the petitioners, they are one of the major domestic industries in India

manufacturing Technical pentaerythritol 95% (Technical penta 95) by importing raw materials such as mono pentaerythritol 98% (mono penta) and technical pentaerythritol 89-90% (technical penta) from Sweden. Technical penta 95, mono penta and technical penta are all different grades of pentaerythritol which are all covered under the anti-dumping investigation initiated under the notification dated February 4, 2005. The grievance of the petitioners is that if anti-dumping duty is levied on the mono penta and technical penta which are imported by the petitioners as raw material, then, it will adversely affect the price of the final product viz. technical penta 95 manufactured by the petitioners. The petitioner being a major producer of technical penta 95, the petitioner cannot be excluded from the category of affected domestic industry. According to the petitioners the raw material imported by the petitioners are captively consumed in the manufacture of penta 95 and, therefore, the import of the said raw material cannot be said cause prejudice to any other domestic industry. Therefore, the investigation initiated at the instance of respondent No.3 in respect of imports from Sweden by excluding the petitioners from the purview of domestic industry is wholly arbitrary, illegal and contrary to law and, therefore, is liable

to be quashed and set aside.

4. Facts relevant for the present petition are that on receipt of a petition from M/s.Kanoria Chemicals and Industries Limited (respondent No.3) alleging that the pentaerythritol is dumped into India from Sweden and China PR, the Designated Authority addressed letters to all the known domestic industries in India with a view to ascertain the facts. One such letter dated October 6, 2004 was addressed to the petitioners by the Designated Authority calling upon the petitioners to furnish particulars regarding the quantity of pentaerythritol produced by them during the years 2000-01 to 2003-04 and also the volume of goods sold by them in the domestic market. Instead of furnishing the requisite particulars the petitioners insisted on seeking a copy of the application made by the respondent No.3. By another letter dated December 28, 2004 the Designated Authority once again called upon the petitioners to comply with the letter dated October 6, 2004 and further called upon the petitioners to inform as to whether they had imported the subject goods during the period of investigation. The petitioners by their letter dated January 31, 2005 furnished information in respect of their production only.

5. In these circumstances, after considering the material on record the Designated Authority by the impugned notification dated February 4, 2005 decided to initiate anti-dumping investigation in respect of pentaerythritol originating in or imported from China PR and Sweden after excluding the production of the petitioners as a part of complaining domestic industry.

6. Mr.Nankani, learned counsel for the petitioners submitted that the impugned notification has been issued in gross violation of Rule 5 of the Anti-Dumping Rules and Section 9A(5) of the Customs Tariff Act because the existence and satisfaction of precondition such as determination of existence, degree and effect of any alleged dumping are not existing in the present case. According to the petitioners the information given by the respondent No.3 was insufficient for initiation of investigation and without giving an opportunity to the petitioner who is a major producer of pentaerythritol in the domestic industry either to support or oppose the application, the Designated Authority could not have taken a decision to initiate investigation.

7. Mr.Nankani further submitted that the

exercise of powers under Rule 5 of the anti-dumping Rules is coupled with the duty to act in the manner prescribed by law. He submitted that it was obligatory on the part of the Designated Authority to act reasonably and judiciously. However, the Designated Authority has abdicated the statutory obligations and duties while exercising powers under rule 5 of the Anti-Dumping Rules in the absence of existence of the circumstances necessitating the exercise of such powers. He submitted that the initiation and scope of enquiry for initiation is itself without jurisdiction. He submitted that the respondent No.2 has further acted biased, assumed jurisdiction by erroneously deciding the jurisdictional facts and misdirected himself in law, despite the fact that the petitioners were the largest producers of the subject goods during the period of investigation. He, accordingly, submitted that the notification dated February 4, 2005 is liable to the quashed and set aside.

8. Mr.Nankani further submitted that the initiation for imposition of anti-dumping duty on pentaerythritol from Sweden and China PR made by the Designated Authority is erroneous and based on an investigation which is improper as per the practice of respondent No.2 in as much as it was initiated on

inaccurate information and that the Designated Authority did not consider factual aspects of the issues concerning the petitioners. Mr.Nankani submitted that the inadequacies in the initiation proceedings were pointed out to the Designated Authority by communication dated February 25, 2005 but the Designated Authority has failed to take into consideration the said inadequacies pointed out by the petitioners and has proceeded with the investigation. Accordingly, Mr.Nankani submitted that the impugned initiation notification dated February 4, 2005 suffers from fundamental errors and is liable to be quashed and set aside.

9. We see no merit in the above contentions. The grievance of the petitioners that no opportunity was given to them either to support or oppose the anti-dumping investigation is without any merit because by two letters dated October 6, 2004 and December 12, 2004, the petitioners were given an opportunity by the Designated Authority to furnish particulars regarding the imports, domestic production and sale of pentaerythritol in the domestic market. It was open to the petitioners to furnish all the particulars and demonstrate before the Designated Authority that the petitioner cannot be excluded from forming part of the domestic

industry. However, the petitioner has failed to do so and has failed to furnish the requisite particulars in that behalf and, therefore, it is not open to the petitioner to make a grievance that no opportunity was given to them.

10. In any event, the discretion exercised by the Designated Authority in excluding the petitioners as a complaining domestic industry for the purpose of pre-initiation enquiry cannot be faulted because firstly the petitioner's were called upon to furnish particulars for initiation of anti-dumping investigation concerning imports of pentaerythritol originating or exported from China PR and Sweden and the petitioners failed to furnish full particulars as required by the Designated Authority. Secondly, it is not in dispute that the petitioner has been importing pentaerythritol in different grades such as mono penta and technical penta from Sweden and, therefore, under Rule 2(b) of the Anti-Dumping Rules, the petitioners being importers could not be said to form part of domestic industry. Thirdly, it is also not in dispute that the petitioners are part of/ affiliated/ joint venture with M/s.Perstorp Group who are manufacturing pentaerythritol in Sweden and other countries. Thus, the petitioners as importers have direct nexus or relation with the foreign supplier in

Sweden. In these circumstances, excluding the petitioners from the category of complaining domestic industry for the purpose of initiating anti-dumping investigation in respect of the imports of pentaerythritol cannot be faulted.

11. Moreover, initiation of anti-dumping investigation itself does not necessarily mean that the anti-dumping duty will be levied automatically on imports of pentaerythritol from Sweden. It is open to the petitioners to putforth their case and satisfy the Designated Authority that there is no dumping of pentaerythritol from Sweden and no injury is caused to any domestic industry on account of imports from Sweden. In that event, the Designated Authority is bound to terminate the investigation under Rule 14 of the Anti-Dumping Rules. Therefore, no prejudice will be caused to the petitioners if the investigation is allowed to be proceeded with.

12. In the present case, the petitioners have specifically pleaded in the petition that because pentaerythritol was imported from China PR by their competitors at dumped prices, the petitioners were forced to import the raw materials from Sweden. Whether the raw materials imported by the petitioners were also at dumped prices and even if it is so,

whether the final product emerging after the incremental processing carried out by the assessee on the imported raw materials continues to be a like product are some of the questions which can be gone into during the post initiation investigation. For the present, suffice it to say that the decision of the Designated Authority in excluding the petitioners for being considered as domestic industry for the purpose of initiating anti-dumping investigation cannot be said to be perverse or biased so as to quash to initiation of investigation. As stated earlier, it is still open to the petitioners to establish that there is no dumping of pentaerythritol from Sweden and there is no injury caused to the domestic industry by such imports so as to drive the Designated Authority to terminate the investigation.

13. It was contended that if at all the anti-dumping investigation in respect of pentaerythritol imported from Sweden is held to be necessary, then the investigation should not be restricted to Sweden only and it should be made applicable to the entire European Union because Sweden forms part of the European Union. It will be open to the petitioners to raise all these contentions before the Designated Authority who is investigating into the matter. In fact an affidavit

has been filed before us on behalf of the Designated Authority stating therein that the petitioner is at liberty to make submissions on all the issues as they deem fit and the Designated Authority will consider the same and pass appropriate order in accordance with law.

14. For all the aforesaid reasons, we see no merit in the petition and, accordingly dismiss the same. However, we make it clear that the observations made herein are prima-facie observations and the Designated Authority shall dispose of the objection of the petitioners on its own merits without being influenced by our order.

15. The petition is dismissed in above terms with no order as to costs.

(V.C. DAGA, J.)

(J.P. DEVADHAR, J.)